No. 142.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONER,

VS.

ELIZABETH VAN ZANT, RESPONDENT.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF OF RESPONDENT.

CHARLES H. MONTGOMERY,
Attorney for Respondent.

November 4, 1922.

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STATEMENT.

Respondent in her brief will adopt the plan of plaintiff and refer in this brief to petitioner as defendant and to respondent as plaintiff.

This action was instituted in the Circuit Court of Jasper County, Missouri, at Joplin, by the filing of petition and issuance of summons thereon, August 20, 1917. The case was tried at the April term, 1919, of said court, and judgment entered in favor of respondent (plaintiff below) on the 28th day of May, 1919.

It is undisputed that defendant (the petitioner here) was an interstate carrier of passengers and that plaintiff received her injury, in the State of Missouri, while riding on a pass issued by defendant to her minor son (an employe of defendant, who lived with plaintiff in her household) for her use, without pay, for an interstate journey from Pittsburg, Kansas, through Missouri, to Howe, Oklahoma.

The sole defense pleaded and relied upon was

> "That plaintiff received her injury while on an interstate journey riding on a free pass issued under Article Five of the Federal Law, known as the Interstate Commerce Act, which permits the issuance of said free transportation to employees of railroad companies and their families."

The pass contained a stipulation on the back that

> "The person accepting and using it, thereby assumes all risk of accident and damage to person and baggage;" that said pass, "being interstate, issued under the Federal Law above mentioned, is to be interpreted and controlled in its effect and operation by decisions of the federal courts construing said Federal Act;" "that under said decisions the conditions on said pass above quoted are valid and binding on the plaintiff and by reason thereof, plaintiff having assumed all risk of accident and damage to her person is precluded and prevented from recovering damage on account of *the negligent acts and things alleged in her petition*" (pleading by inference, that she assumed the risk of negligence of defendant).
>
> (Trans., pp. 4-5, folios 8-9.)

Replying, plaintiff *denied that she assumed the risk of accident or damage to her person due to defendant's*

negligence; alleged that her action was based upon, and was to be determined by the law of the State of Missouri; in the court and under the laws of which state the action was brought, and was not based on federal statute or law; that the stipulation on the back of the pass, if it is urged to relieve defendant from liability *for its negligence,* was void both under the law of Kansas, where the pass was issued and under the law of Missouri, where the injury occurred (Trans. 5-6-7, folios 10 and 13).

It was, and is, conceded by defendant that under the law of both Kansas and Missouri, a contract or stipulation on the part of a common carrier to limit liability or relieve itself from liability for damages to a passenger caused by the carrier's negligence is void.

There was no dispute as to defendant's negligence in the trial court, and only such part of the record as affected the single question appealed on was printed by defendant.

The trial resulted in a general judgment in plaintiff's favor.

In its motion for a new trial, defendant did not present or preserve any constitutional point, and the only point presented and claimed to involve a federal question was that the court erred in refusing to follow the law of the federal courts construing said article five (U. S. Compiled Stats. 1916, Sec. 8563) so pleaded by defendant, as determining the validity of the stipulation and release on the back of the pass.

In its assignments of error in the Missouri Supreme Court, defendant, in addition to the point preserved in

its motion for new trial, as above stated, presented this one point somewhat differently by assigning that the court erred in refusing to instruct that under federal law (referring to the free pass provision of the Hepburn Act, above referred to) the stipulation on the back of the pass was valid and binding.

Under Missouri practice only such points as are made issues and are called to the attention of the trial court in a motion for new trial, and are carried into an assignment of errors, and presented to the Appellate Court as distinctive points, may be considered on appeal, and points not so preserved are waived.

Powell vs. Jackson County, 262 Mo. 403.

On certiorari, the United States Supreme Court follows the same practice with the single exception that where some federal question is presented in some other way to the state Appellate Court, and both sides are heard thereon and the state Appellate Court passes on the specific question, then it may be considered on certiorari.

Hiawasa Power Co. v. *Carolina-Tenn. Co.*, 252 U. S. 341-344.

In the present case, with this single question before it on appeal, the Missouri Supreme Court held that:

> "Congress has not legislated on the subject of the rights and liabilities of the parties in cases of interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act (Article Five of Interstate Commerce Act relied upon by defendant) or respecting the validity of stipulations or conditions annexed to such passes

> exempting the carrier from liability and that therefore these matters remain the subject of regulation by the several states."

Applying this local law, the court held that a stipulation relieving the carrier from liability for negligence was void, and affirmed the judgment of the trial court.

Defendant filed in the Missouri Supreme Court a motion for rehearing, making but the single point that the above holding of the court was wrong, and contending that certain federal decisions cited by it, construing the above Act of Congress, held Congress had taken over the entire subject matter of the questions in issue (i. e., as to liability and as to the validity of the stipulation) to the exclusion of the states. This was the same point originally made in the Missouri Supreme Court, and the motion was overruled.

On this record, we have two questions involved, the finding on either one in favor of plaintiff would authorize this court to decide the cause in favor of plaintiff.

FIRST: Independent of the alleged federal question that the stipulation and release pleaded as in defense against plaintiff's right to recovery for personal injury caused by the negligence of the defendant, the judgment in this case is supported by general finding in favor of plaintiff on the issue made in the pleadings

> "That plaintiff did not enter into any contract with defendant, assuming any risk of accident or damage to her person caused by the negligence of defendant, and that the so-called release pleaded in defendant's answer as a waiver of damage caused by

defendant's negligence, does not contain any agreement waiving damage for injury caused by defendant's negligence."

(Trans., pp. 6-7, folio 9.)
(Trans., pp. 6-7, folios 10-12.)

SECOND: Even if the pass had contained a stipulation agreeing that defendant should not be liable for injury to plaintiff caused by defendant's negligence, yet the point made:

> "Congress has not legislated on the subject of the rights and liabilities of the parties in cases of the interstate carriage of passengers under free passes, not coming within the prohibition of the Hepburn Act, or respecting the validity of stipulations or conditions annexed to such passes exempting the carrier from liability, and therefore, these matters remain the subject of regulation by the several states."

These questions are to be determined by the laws of the state where the injury occurred and where suit is brought and tried in the State Court.

Plaintiff will discuss these questions under the following points: I (1A and 1B), II and III.

On the first question above stated, it will be noted that the stipulation in the pass in this case merely contains the provision that the person accepting and using it thereby assumed all risk of accident and damage to person and baggage. There is no stipulation in this pass, such as was in the pass in the case of *Northern Pac. Ry. Co.* v. *Adams*, 192 U. S. 1. c. 442, and passes in other cases cited by appellant exempting this carrier from lia-

bility for negligent injury to the passenger, but it simply provides that the person riding on the pass assumes the risk of *accident* and damage to person and baggage.

"Accident," as used in this stipulation, is defined by this court, in *Chicago, etc. Railroad Company* v. *Pullman Company*, 139 U. S., l. c. 86, as follows:

> "Accident or casualty, according to a common understanding, proceeds from an unknown cause, or is an unusual effect from a known cause."
>
> "Accident is generally defined as an unusual and unexpected even *happening without* negligence." Corpus Juris, Vol. 1, Sec. 5, pp. 392-393.

Thus the stipulation as to non-liability for accident and damage to plaintiff's person does not relieve defendant as to liability for damage to plaintiff's person caused by the negligence of defendant, as the parties did not contract with respect to defendant's liability for negligence.

In this respect the stipulation differs from those in the following cases cited by defendant:

Charleston & West. Car. Ry. Co. v. *Thompson*, 234 U. S. 557.

Boehring v. *Chesapeake Beach Ry. Co.*, 193 U. S., l. c. 448.

Where, as here, the judgment of the trial court can be sustained on a ground independent of a Federal question, this court will refuse to review it on certiorari or otherwise.

Southern Pac. Ry. v. *Schuyler*, 227 U. S. l. c. 612.

Defendant's specifications of errors, on page 4 of its brief, although four in number, state the same proposition on which they rely merely in different forms, and are, in substance the same as the proposition contained in the heading under the word "Brief" on page 5, under which it is claimed

> "By the Act of June 29, 1906, Congress assumed possession of the subject of free interstate passes, including stipulations contained therein effecting the liability of carriers to the persons riding thereon in interstate journeys and thereby superseding all state control of the subject."

Defendant does not set out or make citation to any part of the Hepburn Act showing any provision where Congress has taken possession of the subject of free interstate passes, including stipulation contained therein affecting the liability of carriers to persons while riding thereon for injury negligently caused by the carrier. The act contains no such provision. Neither does petitioner cite the court to any decision holding that this is the meaning of the Act of June 29, 1906, known as the Hepburn Act. In fact, all of the decisions cited by appellant are cases which were tried and passed upon prior to the passage of the Hepburn Act, except the case, *Charleston & West. Car. Ry. Co.* v. *Thompson*, 234 U. S. 577, and the other cases, which refer to the Carmack Amendment, relate to property and not injury to persons. These cases will be separately discussed and distinguished hereafter.

Defendant's contention is (and that is the only reason urged against the validity of the judgment of the lower court) that there is some provision in the Hepburn Act through which Congress legislated so as to take over the entire field of liability of carriers to persons riding on an interstate free pass, and the entire field as to the validity of contracts made in connection with such passes, relieving the carrier from damage caused by negligence. It is also urged by petitioner that divisions of the Federal Courts and this court have so construed the act in question, and that because thereof the State of Missouri is precluded from applying its law as to liability and as to the validity of a contract releasing the carrier from liability for its negligence, in cases arising in the state court.

POINTS AND AUTHORITIES.

I.

Federal legislation as to carriage of a person on an admittedly free pass has not occupied the field of liability for negligent injury to such person even on an interstate journey. No attempt has been made to regulate or control this liability, and no mention made thereof. The same is true as to a contract designed to exempt the carrier from such liability. Until Congress does act affirmatively on these subjects, the state court or local forum is free to apply its local laws to a case arising in and tried, *nisi*, in the state court, to determine the question of such liability and the question of the validity or non-validity of such contract, even though in so doing it may indirectly affect interstate commerce contracts of carriage.

Hepburn Act, Sec. 8563 (5) p. 9069, U. S. Compiled Stats. 1916.

Maucher v. *C. R. I. & P. Ry.*, 248 U. S. l. c. 362-363.

Savage v. *Holmes*, 225 U. S. 501-533.

Pennsylvania Ry. Co. v. *Hughes*, 191 U. S. l. c. 487-8.

Corpus Juris, Vol. 12, p. 18.

Southern Pac. Ry. Co. v. *Schuyler*, 227 U. S. l. c. 610-12.

Clark v. *Southern Ry. Co.*, 119 N. E. 539.

Weir v. *Roundtree*, 173 Fed. l. c. 779-80-81.

Smith v. *A. T. & S. F. Co.*, 194 Fed. 81.

Southern Pac. Ry. v. *Jensen*, 244 U. S. l. c. 244.

Wiley v. *Grand Trunk Ry.*, 227 Fed. l. c. 129.

For illustration of the point by analogy and distinction of cases, see other cases cited under our Point II, and

Fowler v. *Railroad,* 229 Fed. l. c. 375.
Simpson, et al. v. *Shepard* (Minnesota Rate Case) 230 U. S. p. 352.
Page on Contracts, Vol. 2, p. 1297.

(A) In passing on the question of liability of the carrier for negligent injury to a person riding on a free pass, and the question of the validity of a contract exempting the carrier from such liability, even where the case is tried, *nisi*, in the Federal Court, that court does not determine these questions by reason of any provision of the Hepburn Act, (Sec. 8563 (5) p. 9069, U. S. Compiled Statutes for 1916) but by its own interpretation of the common law.

Southern Pacific Co. v. *Schuyler*, 227 U. S. l. c. 610-612.
Weir v. *Roundtree*, 173 Fed. l. c. 779-80-81.
Smith v. *A. T. & S. F. Ry. Co.*, 194 Fed. 81.
Martin v. *Pittsburgh, etc. Ry. Co.*, 203 U. S. 284, Sec. 8563 (5) p. 9069 U. S. Compiled Stats. for 1916 Anno. West P. Co. Edition.

(B) The United States Supreme Court and the Federal Courts uniformly hold that where, as in the present case, the stipulation on the back of a free pass is void under the local law where the injury occurred, and where the case is tried, *nisi*, in the state court and comes into the Federal Court by way of writ of error or certiorari, the state or local law, as to liability of the carrier for neg-

ligent injury to the person and as to the validity or non-validity of the stipulation purporting to exempt the carrier from such liability, will prevail and be enforced by the Federal Court on review from the state court. It is only where the case is tried, *nisi*, in Federal court, either by being originally instituted in that court or when brought there for trial, *nisi*, by the process of removal, that the Federal Court will apply its own interpretation of the common law.

Williams, Jurisdiction & Practice in Federal Courts, page 193, paragraph 4.
Southern Pac. Ry. v. *Schuyler*, 227 U. S. l. c. 610-612.
Weir v. *Roundtree*, 173 Fed. l. c. 779.
Smith v. *A. T. & S. F. Ry.*, 194 Fed. l. c. 81.
Fowler v. *Railroad*, 229 Fed. l. c. 374-5.
Tweeten v. *Railroad*, 210 Fed. l. c. 830-31.
Charleston, etc. Ry. Co. v. *Thompson*, 234 U. S. 576.

II.

Authorities cited by defendant do not deal with the questions here involved, and are not in point. They fall under the class of cases tried, *nisi*, in Federal Court, on which comment has been made heretofore, or arise either under the Federal enactments with regard to the carriage of interstate telegrams or express, or under Federal enactments with regard to Employers' liability, in both of which cases the Federal Congress has dealt at length with and has occupied the entire field of liability of the carrier, including the subjects of the action and the defenses thereto.

III.

The stipulation on the back of the free pass in the instant case, does not cover the matter of a negligent injury to the *person* of the passenger riding on the pass, and there is no contract in this case purporting to exempt the carrier from liability for such negligent injury. Where a case may be sustained independent of a Federal question, the holding of the state court will not be disturbed.

Cases illustrating distinction here made:

Northern Pac. Ry. Co. v. *Adams,* 192 U. S. l. c. 442.

Charleston & West Carolina Ry. Co. v. *Thompson,* 234 U. S. 557.

Boehring v. *Chesapeake Beach Ry. Co.,* 193 U. S. l. c. 448.

Corpus Juris, Vol. 1, Sec. 5, pp. 392-393.

Southern Pac. Ry. Co. v. *Schuyler,* 227 U. S. l. c. 612.

ARGUMENT.

Four things are to be kept constantly in mind in the argument of this case:

(1) Plaintiff received her injuries within the State of Missouri while riding on a pass *admittedly free.*

(2) The stipulation on the back of the pass to the effect that plaintiff assumed all risk of accident or damage to her person *is conceded to be void* both under the law of Missouri where the injury occurred, and under the law of Kansas, where the pass was issued.

(3) Plaintiff instituted her action in a Missouri State Court, based on Missouri State law and the common law as interpreted by Missouri State courts, to recover for injuries to her person caused by the negligence of defendant.

(4) For the purposes of appeal it was conceded that plaintiff was entitled to recover the amount of the judgment agreed upon in the trial court unless the Hepburn Act, pleaded as a defense, cut off her right of action based on Missouri law.

Keeping these four propositions in mind, the determination of one question by this court in plaintiff's favor will affirm the judgment of the Missouri Supreme Court. This question is:

Did the Congress of the United States, by the passage of the Hepburn Act, defining what constitutes a free pass and to whom the same may be issued, occupy

the entire field of jurisdiction and control over the carriage of gratuitous passengers by railroad, including the field of liability for negligent injury to the passenger—to the exclusion of the right of a Missouri State court to apply and enforce its State Laws for the protection of the life and limb of persons being carried within the borders of the state on free pass, where the injury to the person is caused by the negligence of the carrier?

That Congress did not so occupy this particular field, and that Congress never intended by this enactment to interfere with state laws made for the protection of the life and limb of the traveling public is made clear from a proper consideration and interpretation of the decisions, both state and federal.

Prior to the enactment by Congress of the so-called Carmack Amendment to the Acts of Congress regulating interstate and foreign commerce (which amendment applies only to the carriage of freight or express) each particular state—*notwithstanding Congress had passed an act regulating interstate commerce*—was left free to enact and enforce its local laws as to the carrier's liability or to apply its own rules as to public policy, even though in so doing it might incidentally affect interstate carriers in their commercial relations.

The correctness of the foregoing statement, and the *reason why*, the federal law after the enactment of the Carmack Amendment, superseded and abrogated these local or state laws, is clearly set forth in the opinion of the Supreme Court of the United States in *Adams Express Co.* v. *Croninger*, 226 U. S. 491.

In the foregoing opinion, speaking of, and upholding the right of the state to determine the liability of the common carrier prior to the Carmack Amendment, at local citation 488, the court said:

> "While under these provisions it may be said that Congress has made it obligatory to provide proper facilities for interstate carriage of freight, and has prevented carriers from obstructing continuous shipments on interstate lines, *we look in vain for any regulation of the matter here in controversy.* There is no sanction of agreements of this character limiting liability to stipulated valuations, and, *until Congress shall legislate upon it, is there any valid objection to the state enforcing its own regulations upon the subject,* although it may to this extent indirectly affect interstate commerce contracts of carriage?"

Further, along this same line, quoting from the opinion local citation 504:

> "Prior to that amendment the rule of carrier's liability, for an interstate shipment of property, as enforced in both federal and state courts, was either that of the general common law as declared by this court and enforced in the federal courts * * * or that determined by the supposed *public policy of a particular state,* * * * or that prescribed by statute law of a particular state."

In *Pennsylvania Ry. Co.* v. *Hughes,* 191 U. S. l. c. 488, the court held:

> "It is well settled that the state may make valid enactments in the exercise of its legislative power to promote the welfare and convenience of its citizens, although in their operation they may have an effect upon interstate traffic."

It is a well recognized principle of law that although the Constitution of the United States contains an express *grant to Congress* of the power to regulate interstate and foreign commerce, nevertheless, until Congress has acted, and acted in such a manner *as to take over the entire field*, the states are left free to apply their own laws and views of public policy in matters incidentally affecting interstate carriers in their commercial operations. The powers of the Congress of the United States are those *granted* by the Constitution of the United States. The powers of the various states within their own respective borders are inherent, and can only be cut down by express limitation in the Constitution of the United States.

The dissenting opinion of Mr. Justice Pitney, in the *case of Southern Pacific Railway Co.* v. *Jensen*, 244 U. S. l. c. 244-5-6, has grouped a number of instances where Congress, while enacting laws regulating interstate commerce, has yet failed to take over, by legislative enactment, certain subjects relating thereto, and in which the federal courts have uniformly held that the states were left free to announce and enforce their own policies and laws even though in doing so they incidentally affected interstate carriers in their commercial relations. Speaking of the Carmack Amendment, and the effect it had on state laws imposing liability on carriers, Judge Pitney, at local citation 244, said:

> "So it required an Act of Congress (the so-called Carmack Amendment to the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) to impose a uniform rule of liability upon rail carriers

for losses of merchandise carried in interstate commerce *Adams Express Co.* v. *Croninger*, 226 U. S. 491, 504. In a great number and variety of cases state laws and policies incidentally affecting interstate carriers in their commercial operations have been sustained by this court, in the absence of conflicting legislation by Congress."

To the same effect is the opinion in *Adams Express Co.* v. *Croninger*, above cited, wherein, at local citation 500, the court said:

"But it is equally well settled that until Congress has legislated upon the subject, the liability of such a carrier, exercising its calling within a particular state, although engaged in the business of interstate commerce, for loss or damage to such property, may be regulated by the law of the state. *Such regulations would fall within that large class of regulations which it is competent for a state to make in the absence of legislation by Congress, growing out of the territorial jurisdiction of the state over such carriers and its duty and power to safeguard the general public against acts of misfeasance and nonfeasance committed within its limits, although interstate commerce may be indirectly affected:* *Smith* v. *Alabama*, 124 U. S. 465; *New York &c. Railroad* v. *New York*, 165 U. S. 628; *Chicago, Milwaukee & St. P. Ry.* v. *Solan*, 169 U. S. 133, 137; *Richmond &c. Ry.* v. *Patterson Co.*, 169 U. S. 311; *Cleveland &c. Ry.* v. *Illinois*, 177 U. S. 514; *Pennsylvania Railroad* v. *Hughes*, 191 U. S. 477. In the Solan case, cited above, it was said of such state legislation:

"'They are not, in themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has

> not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.'"

Referring again to the case of *Adams Express Co. v. Croninger*, above cited, the court, at local citation 504, states the *reason why* the Carmack Amendment changed the situation, and took away from the various states the right to declare and enforce their own rules of liability as to a common carrier engaged in interstate commerce, as to the carriage of express or freight. Summed up, this reason is stated in the opinion at local citation 505, as follows:

> "That legislation (Carmack Amendment) supersedes all the regulations and policies of a particular state *upon the same subject* of the *liability of the carrier* under a bill of lading which he must issue and limits his power to exempt himself by *rule, regulation or contract. Almost every detail of the subject is covered so completely that there can be no rational doubt but* that Congress intended to *take possession of the subject.*"

And further:

> "To hold that the liability therein declared may be increased or diminished by local legislation or local views of public policy will either make the provision less than supreme or indicate that Congress has not shown a purpose *to take possession of the subject.*"

Quoting from local citation 504 above referred to, the court holds:

"The significant and dominating features of that amendment are these: * * *

Second. Such initial carrier is made *'liable to the lawful holder thereof for any loss,* damage, or injury to such property caused by it.'

Third. It is also *made liable* for any loss, damage, or injury to such property caused by 'any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass.'

Fourth. It *affirmatively declares* that *'no contract,* receipt, rule or regulation *shall exempt* such common carrier, railroad or transportation company *from the liability hereby imposed.'*"

It will be noted that in the above case a bill of lading was issued in the State of Kentucky, and, on the back thereof, was a stipulation limiting the carrier's liability to the declared value of the goods shipped. Under the local, or Kentucky law, this contract limiting the recovery was invalid, and the shipper could recover the actual value. The Carmack Amendment expressly covered this same question of liability, and, for this reason, the court in the above case, at local citation 506, said:

"The *duty to issue* a bill of lading and *the liability thereby assumed are covered in full* (in the Carmack Amendment) and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt *a uniform result* and relieve such contracts from the *diverse regulation* to which they had been theretofore subject."

The parenthesis is ours.

In other words, Congress established a uniformity of rates and classification of service with regard to the

carriage of freight and express, and *itself made provision for the liability of the carrier growing out of the contract of carriage.*

An analysis of the foregoing opinion and of the *reasons* of the court for holding that the state laws were superseded by the Act of Congress in the Carmack Amendment clearly demonstrates that the Hepburn Act as to the issuance of free passage *has not abrogated* or affected the right of our state court to enforce its local laws as to the *liability* of defendant to plaintiff in the present case.

The Hepburn Act, with relation to a free pass, simply defines what shall constitute a free pass; to whom the same may be issued, and provides a penalty for use of such pass by or the issuance thereof to a person not coming within the excepted class.

The act in no way attempts to deal with or regulate *the subject of liability* on the part of the carrier for negligent injury to a person to whom such a pass is legally issued, while riding on such pass. It creates no such liability and gives no cause of action therefor, but is wholly silent on *the subject*. As before stated, even when a cause of action is tried, *nisi*, in a Federal Court, for negligent injury to a passenger by a carrier, even when the passenger is riding on a free pass, the Federal Court does not determine that the liability exists from any provision of the Hepburn Act; neither does it enforce such liability by reason of any provision of the Hepburn Act. It goes to the common law, as interpreted by the Federal Courts, to establish the liability and to enforce it. On this ques-

tion of *liability*, the sole province of the Hepburn Act is to determine what constitutes a free pass.

Neither does the Hepburn Act refer to or attempt to deal with the question or *subject* of the right of the carrier to *contract* with the person riding on a free pass as to the carrier's liability. The carrier is under no obligation to issue the pass in any event.

Our position is sustained by the opinion of this court in *Maucher* v. *Chicago R. I. & P. Ry.*, 428 U. S. l. c. 362-363. This was an action for personal injuries in a case tried in the state court and brought to this court on writ of error. The trial court held, as did the Missouri court in the instant case, that liability was to be determined by the law of the State of Nebraska. This was affirmed by the Supreme Court of Nebraska. In deciding this case and discussing the question, this court declared the law as follows:

> "The railway admits that prior to the enactment of the Carmack Amendment (Act of June 29, 1906, c. 3591, No. 7, 34 Stat. 584, 595) Congress had not dealt with the right of carriers to limit by contract their liability for injuries occurring in interstate transportation, and that consequently the states were free to establish their own laws and policies and apply them to such contracts. *Pennsylvania R. R. Co.* v. *Hughes*, 191 U. S. 477. But it contends that this power of the states was superseded by the Carmack Amendment, since that amendment, dealt with the power of carriers to contract in respect to such liability; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Boston & Marine Railroad* v. *Hooker*, 233 U. S. 97; that it was the

> intention of Congress to deal with the whole subject; and that the rights of plaintiff in respect to personal injuries is governed by the federal law. But the Carmack Amendment deals only with the shipment of property. Its language is so clear as to leave no ground for the contention *that Congress intended to deal with the transportation of persons.*"

On the contrary, the Carmack Amendment, with respect to interstate carriage of freight, *expressly provides the liability* and the *means of enforcement thereof.* It *expressly forbids the making of any contract limiting that liability.* Moreover, it compels the issuing of the bill of lading, and regulates the provisions thereof, as well as regulating the rates of carriage and the class of service.

The *subject* dealt with in all the express company cases, that is, the *liability of the carrier,* and the question of a contract limiting that liability, has been expressly provided for or against; the right of action provided for and *given* and the method of *enforcement* of the liability are expressly provided for in the Carmack Amendment itself.

Only three matters are legislated upon by Congress in the Hepburn Act with regard to a free pass:

(1) The free pass is defined.

But, in the present case, the pass is admittedly a free pass.

(2) The excepted class to whom free passes may be issued are set forth.

But it is defendant's contention here that respondent came within the excepted class, and could legally receive and ride on the pass.

(3) A penalty is imposed for illegal issuance or use of a free pass.

But no such illegal issuance or use is claimed or occurred in the present case.

The question, then, is: As no provision of the Hepburn Act is violated, and as Congress *is silent on the question of liability* of the carrier to a person legally riding on a pass for negligent injury to such person, wherein has Congress taken over the *subject of this action* so as to abrogate state law as to such liability?

We now take up the line of cases which directly deals with the liability of the carrier of a passenger riding on a free pass for injury to that passenger.

In this discussion it will be well to bear in mind the distinction heretofore made as to the way in which cases reach the Federal Court. On the one hand the case might originally be brought in the Federal Court or taken to the Federal Court from the State Court by removal. By either method the Federal Court has original jurisdiction of the cause of action and, consequently, applies its own rules and ideas of what might be termed the Federal Common Law with relation to the subject of negligence. On the other hand, the case might be brought and tried originally in the State Court, and after decision in the State Court, be taken to the Federal Court on writ of error on the ground that some federal question or law that has arisen therein has been erroneously construed and applied in and by the State Court. In this latter

instance, the Federal Court will *follow* the interpretation of the State Court in applying the state or local law and will simply ascertain whether or not the *State Court,* in applying such state law, has incorrectly interpreted or applied any federal law arising therein. Indeed, if the judgment of the State Court can stand independent of the ruling of the federal question involved, whether that ruling be right or wrong, the Federal Court will not disturb the judgment of the State Court. This rule is clearly set out in Williams on Jurisdiction and Practice of Federal Courts, page 193, paragraph 4, as follows:

> "In so far as questions of general jurisdiction are concerned the federal courts have always held that they were bound to decide for themselves, though leaning toward an agreement with the views of the State Court. It must be understood that I speak here of cases where the *responsibility of original decision rests upon the federal* courts, and not of cases coming to the Supreme Court upon a writ of error to the State Court of final jurisdiction. In cases of the latter sort, the Supreme Court *confines its review to the federal rights or immunities alleged to have been infringed,* and cannot consider the correctness or incorrectness of the conclusions of the lower court, *in so far as they are merely concerned with questions of state law, statutory or common.*"

Moreover, in dealing with the Hepburn Act as to free passes, an examination of the cases arising *nisi* in the Federal Court will show that the *liability* was determined *not* by any provision of the Hepburn Act, but by the common law as interpreted by the federal courts.

the only province of the Hepburn Act in the decision being to define what constituted a free pass.

The case of *Southern Pacific Co.* v. *Schuyler*, 227 U. S. l. c. 610, a case where deceased was killed while riding on a free pass on an interstate journey, recites the rule as follows:

> "Whether the Hepburn Act prohibits a carrier from giving free interstate transportation to the employes of the Railway Mail Service when they are not on duty but are traveling for their own benefit or pleasure, is, of course, a federal question.
>
> But whether—assuming that question be answered in the affirmative—the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in the absence of an Act of Congress regulating the matter) a question not of federal but of state law.
>
> It is settled by numerous decisions of this court that where the decision in the State Court adverse to the plaintiff in error proceeds upon two independent grounds, one of which, not involving a federal question, is sufficient to sustain the judgment, the writ of error will be dismissed or the judgment affirmed, according to the circumstances."
>
> See cases cited in opinion.

The following discussion, in connection with the various federal cases therein cited and analyzed, establishes beyond question the fact that plaintiff's right of action in the present case, as well as the validity of a contract as to defendant's liability, *is to be determined, in this action, by state law* and not by federal law.

The sole federal question that can arise in the pres-

ent case is as to whether or not the pass on which plaintiff was riding at the time of her injury was a free pass. As it is conceded that it was a free pass, and as the Hepburn Act relating to the issuance and use of the free pass contains no provision relating to the liability of the carrier to a person riding on a free pass, or relating to the subject of a contract limiting any such liability, the only federal question that could ever have arisen in connection with this case has been taken from the case.

The sole question left is this: Is the validity of the stipulation on the back of the pass to the effect that plaintiff assumed all risk of accident and damage to person or property to be determined by the local laws of the State of Missouri, where the injury to plaintiff occurred —the action having been brought in a Missouri State Court—or by the common law as interpreted by the federal courts?

That this is to be determined by the local or state law is no longer an open question.

As establishing this proposition, and for the purpose of illustrating the distinction made between cases such as the present one, on the one hand, and cases that are tried, *nisi*, in the Federal Court, on the other (either by being brought originally in the Federal Court or by being transferred to the Federal Court by the process of *removal* in a proper instance) we group and quote from:

> First. Cases tried, *nisi*, in state courts, and which come into the Federal Court by writ of error to the State Court:

Second. Cases tried, *nisi,* in the Federal Court (including cases taken from the State Court, for trial *nisi,* to the Federal Court by the process of removal).

We first take up group one, where, *just as in the present case,* the trial *nisi* was in a state court. In this group it will be seen that the local, or state law determined the question of liability, as well as the validity of a contract made to limit that liability, and, where the case reached the Federal Court on some federal question, by writ of error, the Federal Court *determined the liability under state or local law* and limited its inquiry to a determination of whether or not the State Court, in applying its local law, misinterpreted some federal statute. As we will point out hereafter in this argument, this is precisely what was done in the case of *Charleston, etc., Ry. Co.* v. *Thompson,* 234 U. S. 576.

In *Southern Pacific Co.* v. *Schuyler,* 227 U. S. l. c. 612, the court said:

> "* * * We have examined the evidence in the record and *find that it fairly supports the conclusion of the State Court* that deceased was accepted by *plaintiff in error* as a gratuitous passenger.
>
> But finally it is argued (b) that it was beyond the power of the State Court to 'read into the Hepburn Act an exception in favor of gratuitous passengers'; thereby (as is said) enlarging the class to whom Congress limited the right of free interstate transportation. This is ingenious, *but, as we think, unsound.* . As applied to the concrete case, it is equivalent to saying that the operation of the

> Hepburn Act is such as to deprive one who, in good faith and without fraud, and with the consent of the carrier, but in actual though unintentional violation of the prohibition of the act, accepts a free passage in interstate transportation, *of the benefit of a rule of local law that renders the carrier in such circumstances responsible for exercising care for the passenger's safety* because the carrier has voluntarily undertaken the burden of such care."

The same *ingenious but unsound argument* is urged in the present case by defendant to the effect that respondent should be deprived of the benefit of the local, or Missouri law, which declares a contract, such as the one printed on the back of the pass in the present case, exempting the carrier from liability for its negligence, is void as a matter of public policy.

The United States Supreme Court, in the above case, holds this argument unsound, and not supported by any provision of the Hepburn Act, at local citation 612, where it says:

> "But the act itself declares what penalty shall be imposed for a violation of its provisions: 'Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty, etc., * * *. This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition by either giving or accepting gratuitous interstate passage. *The deceased no more forfeited his life, limb or safety,* **and no more forfeited his right to the protection accorded by the local law to a passenger in his**

situation than the carrier forfeited its right of property in the mail car upon which the deceased rode. *His right to safe carriage was not derived,* **according to the law of Utah,** *from the contract made between him and the carrier,* and therefore **was, not deduced from a supposed violation of the Hepburn Act.** It arose from the fact that he was a human being, of whose safety the *plaintiff in error* had undertaken the charge. With its consent he had placed his life in its keeping, *and the* **local law** *thereupon imposed a duty upon the carrier irrespective of the contract of carriage.* **The Hepburn Act does not deprive one who accepts gratuitous carriage,** under such circumstances, **of the benefit and protection of the law of the state in this regard.**"

"It results that the judgment under review must be affirmed, irrespective of the question whether the Hepburn Act forbids the giving of free interstate transportation to the employes of the Railway Mail Service when not on duty."

The above decision shows conclusively that irrespective of any prohibition in the Hepburn Act as to the giving of a free pass, the question of defendant's liability for plaintiff's injury will be determined by the laws of the State of Missouri under which the action is brought and on which it is based. This must abide the ultimate determination of the cause by the state court of last resort.

The United States Circuit Court of Appeals of the Eighth Circuit, in which Missouri is located, in an opinion by Judge Munger, concurred in by Judges Sanborn and Van Devanter, the latter now being a member of the United States Supreme Court, in the case of *Weir*

v. *Roundtree,* 173 Fed. l. c. 779, 780, 781, is decisive on this question. In discussing this question, beginning at l. c. 779, the court said:

> "It was further held that, as Congress had not, in the exercise of its power over the interstate commerce, legislated with respect to such contracts, that it was open to the states to determine the validity of such a contract. The court cited the case of *Chicago, Milwaukee, etc. R. R. Co.* v. *Solan,* 169 U. S. 133, and quoted therefrom the following:
>
> 'A carrier exercising his calling within a particular state, although engaged in business of *interstate commerce is answerable according to the law of the state for acts of nonfeasance or of misfeasance committed within its limits.* * * * The rule prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property otherwise endangered by their use, are strictly within the scope of the local law.'
>
> 'The state has the right to promote the welfare and safety of those within its jurisdiction by requiring common carriers to be responsible to the full measure of the loss resulting from their negligence, a *contract to the contrary notwithstanding.*'"

Here the court in the opinion cites the case of *Martin* v. *Pittsburg & Lake Erie Ry. Co.,* 203 U. S. 284, in which it was held that the question was a local question for the state to determine. This is followed in the opinion by Sections 5857-5858 of the Statutes of Kansas, which were introduced in evidence in this case. Thus, we see that in the present case the contract of release on

the back of the pass on which the plaintiff, Mrs. Van Zant, was riding, was void not only in the State of Missouri, where the injury occurred, but likewise void in the State of Kansas where the pass was issued. In discussing this the United States Court of Appeals used the following language (*Weir* v. *Roundtree*, 173 Fed. l. c. 780):

> "The Supreme Court of that state (Kansas), construing these sections, have held that a railroad company could not contract in advance for the waiver and release of the statutory liability imposed upon every railroad company organized or doing business in that state, and that a contract in contravention of this statute was void."

In the case of *Smith* v. *A. T. & S. F. R. R. Co.*, 194 Fed. 81, decided February 14, 1912, long after the passage of the Hepburn Act, and when the Hepburn Act contained the same provisions it now does, in discussing this identical question, the United States Circuit Court of Appeals of the Eighth Circuit, in an opinion by Judge Amidon, concurred in by Judge Van Devanter and Judge Riner, announced the law on this question to be that a release of the kind pleaded by the defendant in the answer in this case must be decided according to the local law of the state where the injury occurred. The pass in the case of *Smith* v. *A. T. & S. F. R. R. Co.*, was issued under the laws of the State of Kansas, where the court says, that the provision of waiver of damage on the back of the pass was void under the Kansas Statutes, but the injury occurred in the State of

Oklahoma, under whose law the contract of waiver and release on the back of the pass *was valid* (just as such a contract is valid under the laws of the State of Georgia, which was under consideration in the case of *Charleston Railway Company* v. *Thompson*, 236 U. S. 376, relied upon by defendant in this case). In this case, 194 Fed. l. c. 81, the Court of Appeals says:

> "In such cases (referring to contracts for release for damages in case of torts by passenger against carrier), the law of the place where the injury occurs defines the rights of the parties."
>
> (Citing 183 U. S. 263; *Weir* v. *Roundtree*, 173 Fed. 776).

Further quoting:

> "The courts have uniformly held that a contract exempting a carrier from liability for negligence, valid at the place of its execution and delivery, will not avail as a defense when the injury occurs in a state by whose laws such contracts are declared to be void as against public policy. (That is, if the contract was valid in the state where the pass was issued and injury should occur in the State of Missouri, where the contract was void as against public policy, it would constitute no defense.) Having adopted that rule when the law of the place of the injury would impose a liability upon the carrier, can a contrary rule be adopted when such law would protect the carrier by enforcing the contract? We think not. The contract is by its terms tied to the tort, and the same law should be applied to the one as to the other. * * * Such being the nature of the pass, the condition on its back accompanied its use. *If that condition was void by the law of the state where the injury occurred, it would be disregarded. If it was valid, it would be enforced.*"

(The parenthesis is ours.)

To further illustrate and clarify the distinction above made, we now discuss a few cases where, *unlike the present case,* the trial, *nisi,* was in a Federal Court, either from having been started there in the first instance, or from having been transferred to the Federal Court by the process of *removal.* As we have heretofore said, in such instances, the Federal *trial court,* instead of following the local or state law as to liability—as the entire question of liability is submitted to the Federal forum—applies its own interpretation of the *common law* as to that liability. In a consideration of the following cases coming within this group, we again call the court's attention to the necessity of bearing in mind the distinction to be made as to the *first group,* where the trial, *nisi,* is in a State Court, and where, as we have seen, the local or state law as to liability is to be applied, even by the Federal Court in taking the case, on writ of error to the State Court.

Fowler v. *Railroad Co.,* 229 Fed. 374-375, *was brought originally in the Federal Court.* The question was squarely presented as to whether the Federal Court should apply its own interpretation of the common law, or should follow the local, or state laws. The court, at l. c. 375, said:

> "We think the contention that the contract or release must be construed by the laws of the State of Pennsylvania because the accident occurred there cannot be maintained. The question of the validity of the release is one not to be determined by local law, but **in suits in the United States**

Courts by decisions of those courts and by the general law, and, in the absence of a statute holding such a release invalid, the United States Courts will uphold them unless prohibited from doing so by some controlling authority. The law of the United States Courts seems to be settled that the courts of the United States (referring to trial courts) are not controlled by state decisions but are at liberty to adopt their own views of the law."

So, in the case of *Beutler* v. *Grand Trunk R. R. Co.*, 224 U. S. 85, the same distinction is made, in the following language:

> "So it has been decided that *in cases* **tried** *in the United States courts we must follow our own understanding of the common law* when no settled rule of property intervenes."
>
> * * * * * *
>
> "It may be that *in the State Court* the question would be left to the jury."

The case of *Wiley* v. *Grand Trunk R. R. Co.*, 227 Fed. l.c. 129, while being distinguished from the present case in that the injured passenger was riding on a "drover's pass" (which is held to import a consideration, so that the pass is not, in fact, gratuitous), *clearly* announces the distinction in the following:

> "The only issue raised by this motion is the validity of the release. If the plaintiff had been a gratuitous passenger, there is no doubt but under the decisions of the United States Supreme Court the release would have been valid *in the Federal Courts* in the absence of willful or wanton negligence *irrespective of the Hepburn Act. Northern Pac. R. R. Co.* v. *Adams*, 192 U. S. 440; *Boering* v. *Chesapeake, etc., Ry. Co.*, 193 U. S. 442."

Thus, the court announces that in suits *in the Federal Court, i. e., tried nisi in that court,* that the Federal Court will apply its own interpretation of the common law, but that this will be *irrespective of the Hepburn Act.* The opinion continues:

> "But the plaintiff would not have been a gratuitous passenger prior to the Hepburn Act, for the reason that right to ride without special compensation was given in part consideration of the payment which was principally for other services. * * *
>
> Here we are brought to the vital question involved in this motion.
>
> *Has Congress by the Hepburn Act, so-called, regulated the invalidity of such a release as is this, to the exclusion of the law of the state? In my judgment* **it has not.**"

We direct the court's attention to the fact that there is not a word in the Hepburn Act referring to the question of a contract for a release from liability in connection with the issuing of a free pass. The above case is conclusive to the effect that the Hepburn Act has nothing to do with a case such as the one now before the court, where the pass was admittedly free.

Further quoting:

> "The release does not offend either the letter or spirit of the interstate commerce legislation of Congress."

Further, in paragraph 3, of the opinion:

> "The plaintiff's right to safe carriage and the question whether the relation of passenger and carrier exists in the absence of any Federal *statute* regulating the matter are therefore *matters of*

state law. Southern Pacific Co. v. *Schuyler*, 227 U. S. 601. So that the ultimate question is: **What is the state law which influences the validity or invalidity of the release?''**

To answer this question in the present case, we repeat that under both the law of Kansas, where the pass was issued, and under the law of Missouri, where the injury occurred, **the release was invalid.**

Some of the Federal authorities, including the United States Circuit Court of Appeals for the Second Circuit, are to the effect that the validity of such a release is to be determined by the local or state law of the state where the pass was issued, while the Eighth Circuit, in which is located the State of Missouri, holds that it is to be determined by the local law of the state where the injury occurred. This makes no difference in the present case in view of the fact that the release is invalid in either case.

Tweeten v. *Railroad*, 210 Fed. l. c. 830-831, was one where the case was transferred by *removal* from a State to a Federal Court for trial *nisi*. In making the same distinction which we are here making, the court said:

> "The rule is otherwise in the Federal Court, and the plaintiff, a citizen of the State of Washington, while he might, on the ground of the lineman's negligence, *have had a good cause of action in the State Court* in which the action was originally begun, was deprived of that right when the defendant, *a corporation of New Jersey*, **removed** *the cause to the court below*. (i. e., into the Federal Court for trial, *nisi*.)"

With reference to this question of *removal* from a State to a Federal Court, we call the court's attention to the state of the record in this case. The case was originally filed in the Jasper County, Missouri, Circuit Court, and, on application of defendant transferred to the Federal Court by process of removal on the claim that a Federal question was involved. But the Federal Court held that it was improperly removed from the State Court, and sent it back to the State Court for trial, *nisi*.

The case being tried *nisi* in the State Court, must be tried under state laws.

We direct the court's attention, also, to the fact that in such cases as *Northern Pac. Ry. Co.* v. *Adams*, 192 U. S. 440, and *Boering* v. *Railroad*, 190 U. S. 442, cited by defendant, brought originally in the Federal Court or transferred thereto by the process of removal, and tried *nisi* in the Federal Court, that court, in passing on the question of the validity of a release on the back of a free pass, *does not base its decision on any provision of the Hepburn Act*, but on the principles of common law as interpreted by the Federal Court. This is apparent when it is noted that these cases arose eight and two years respectively before the Hepburn Act of 1906 was adopted.

It appears, conclusively, from the above analysis of the cases, under the two groups within which they naturally fall, that the court, in determining the validity of the release agreement on the back of the pass in this case cannot consider, as authorities in point for appellant, any cases such as the following:

1st. Cases that are originally brought in, or transferred to, by removal, the Federal Court, for trial *nisi*.

2nd. Cases which deal with the Carmack Amendment, for in these the Federal Statutes have been extended so as to cover the entire field of liability, including the right of action, the defenses, and the question of the right to limit the liability by contract, all of which are covered by Congress by express legislative enactment.

3rd. Cases wherein the local law of the state (unlike Missouri and Kansas) such as Georgia and Oklahoma, declare a contract exempting a carrier from liability to a person riding on a free pass is *valid under state law*.

4th. Cases, such as the telegraph cases, where Congress has taken over the entire field as to rates and service, and the matter of contract as to such rates and service, and has placed the whole subject under the direct control of the Interstate Commerce Commission.

Cases falling within any of the above classifications are not in point for defendant here, but, on the contrary, when properly analyzed, and the *reason for the decision* examined, are authorities in support of plaintiff's claims.

Defendant relies chiefly on the case of *Charleston & West Carolina Ry. Co.* v. *Thompson*, 234 U. S. 576. This case is not an authority for defendant, as it applied the state or local law of Georgia to determine the question of the validity of a stipulation on a pass exempting the carrier from liability for its negligence on review in the Federal Court, and the sole Federal question in-

volved was whether or not the pass in question was, in fact, free.

In that case, the plaintiff, a member of the family of an employee of the railway company, was riding on a pass issued without cost, on an interstate journey. On the back of the pass was a stipulation exempting the carrier from liability for negligent injury to the person riding thereon, *which stipulation was valid and enforcible under the local law of Georgia where the injury occurred.*

Under the law of Missouri *such a stipulation is void.*

The Georgia *nisi prius* court held the pass a free pass, and as the law of Georgia recognized the validity of the stipulation exempting the carrier from liability for its own negligence, held that there could be no recovery.

On appeal, the Georgia Appellate Court held such a stipulation binding in a free pass, but held that the Hepburn Act created an exception and that a so-called free pass under that act issued to a member of an employe's family really *was not a free pass* but was issued upon consideration of the services of the employe. It held that the jury might infer that the pass was issued for value.

The United States Supreme Court, on writ of error to the Georgia Court of Appeals, after holding that the Hepburn Act means what it says when it defines such a pass as a free pass, and that the question of whether the pass was, in fact, free, was the sole Federal question involved in the case, held, at local citation 578:

"As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals (of the State of Georgia), as we have stated, and is established by the decisions of this court (*not by the provisions of the Hepburn Act*). *Ry. Co.* v. *Adams*, 192 U. S. 440, and *Boering* v. *Chesapeake Beach R. R. Co.*, 193 U. S. 442."

It will be noted from the above quotation that the court held that the validity of the stipulation *was conceded* by the Georgia court, and simply decided that as the pass was free, there could be no question as to the validity of the stipulation.

In the present case, applying the ruling in the Georgia case above cited, as the pass is admittedly free, this sole Federal question is removed from consideration, and, *applying the local law of Missouri* (or Kansas, for that matter) to the question of the right of the carrier to exempt itself from liability to plaintiff by contract, *we find that such a contract is void as against public policy.*

A well reasoned case in which the facts are very similar to those in the case before this court is that of *Clark* v. *Southern Ry. Co.* (Ind.), 119 Northeastern 539. We commend this entire opinion to the court, as it points out many of the distinctions we have made, and interprets *Charleston, etc., Ry. Co.* v. *Thompson*, 234 U. S. 576, as we have in this argument.

After discussing, at l. c. 542, the provision of the Hepburn Act requiring common carriers to file with the Interstate Commerce Commission schedules of rates,

fares and charges, and the rules or regulations which change these rates, fares or charges, and the provision that if they are not so filed, they shall be void, the court, at l. c. 542, col. 2, says:

> "The word, 'rate,' as used in the Interstate Commerce Act, means the net cost to the shipper; the net amount the carrier receives and retains for the transportation service.
>
> * * * * * * * *
>
> It is apparent that each of these words—rates, fares, charges—as used in the Commerce Act, has in it the idea of compensation for services performed. A free pass, however, is otherwise. As we have said, it calls for gratuitous service voluntarily performed."

There then follows a discussion, at l. c. 543, to the effect that Congress never contemplated that the schedule so filed should include gratuitous passes.

There follows an analysis of such cases as *Adams Express Co.* v. *Croninger; Charleston, etc., Ry. Co.* v. *Thompson*, above cited, and of the Carmack Amendment.

To the following, we direct the court's especial attention. At l. c. 546, col. 2, in discussing the case of *Charleston, etc., Ry. Co.* v. *Thompson*, the court said:

> "The cause reached the Federal Supreme Court on a writ of error, and while that court recognized as sound the principle announced by the State Court that such an exemption is valid only as against a free pass, the question actually considered and decided was that such a pass issued under the Hepburn Act is in fact free. As that question

involves the construction of a United States statute, it was a Federal question. By reason of that question the Federal Supreme Court assumed jurisdiction. That case does not hold that Congress by the Hepburn Act has entered the legislative field of free passes to the extent that all state regulations bearing on the subject are suspended.

"The general purpose back of the Hepburn Act is, as we have said, the establishing of equality in rates, fares, and charges for the transportation of persons and property, and the preventing of unfair discrimination. Formerly public carriers might and actually did, issue free passes at pleasure. Through such an instrumentality it was possible for them to accomplish the opposite of the purposes of the Hepburn Act. The section now under consideration is in harmony with the general spirit of the act. It specifies the classes to whom free passes may be issued. The nature of the specified classes is such that unfair discrimination is not likely to result from the issuing of passes to them. The subject-matter of the section is merely to whom free passes may issue. It contains no provision respecting the rights of the carried or the liabilities of the carrier under such a pass or what stipulations or conditions may lawfully be promulgated or specified respecting the use of passes so issued, or how such stipulations or conditions must be brought to the attention of the carried, if at all. We do not believe that the Hepburn Act in any of its provisions suspends the operation of either the Indiana statute or the section of the Kentucky Constitution above set out as relating to passenger traffic. When Congress legislates merely respecting a certain element of a general subject, the field is not thereby invaded so as to suspend state legislation or state law dealing with other elements of the general subject and not inconsistent with the Federal legislation. Thus in *Minneapolis, etc., Co.*

> v. *Popplar*, 23 U. S. 369, 35 Sup. Ct. 609, 59 L. Ed. 1000, the court deals with an action involving the Federal Safety Appliance Act (Act March 2, 1893, c. 196, 27 Statutes at Large, 531, and Act March 2, 1903, c. 976, 32 Statutes at Large 943 (U. S. Comp. St. 1916, Sections 8605-8615), respecting which the court says:
>
> 'The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute in the present case touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.' "

The telegraph and Federal Employers Liability cases cited by defendant do not support its position.

With respect to interstate commerce by telegraph, Congress has legislated *specifically* and *exclusively* as to *classification of service* and *uniformity of rates* for the same class of service throughout the various states. The telegraph cases have arisen in one of two ways; either the state law has imposed a penalty for erroneous transmission of an unrepeated message, or has imposed a penalty for failure to deliver or to deliver promptly. In holding that the several states no longer have this right with respect to *interstate messages*, the federal decisions and decisions of this court have given the uniform reason that Congress has, by *express enactment*, taken over the whole subject of *classification of service* and *uniformity of rates*, and to allow the different states to impose different penalties for erroneous transmission of unrepeated

messages (or for any class) would work a destruction both of the *uniformity of classification* and the *uniformity of rates* throughout the various states. Likewise, owing to the peculiar nature of interstate telegraphic communication, it is impossible to tell in what state the violation (or tort) occurred, and as most of the laws are aimed at a failure to deliver, which must take place *in another state,* the laws are *extra territorial in effect,* and therefore clearly beyond the power of the state.

These cases are based on prior cases, such as *Western Union Telegraph Company* v. *Brown,* 234 U. S. 542, which was a suit for mental anguish for failure to deliver a message in the District of Columbia, dispatched from South Carolina, the law providing the right of action being a law of South Carolina.

It was held by the court that, as the failure to deliver was in another jurisdiction, the tort being committed there, and to uphold the law of South Carolina for the failure to deliver in the District of Columbia, would be to give to the law of South Carolina an extra territorial effect and, further, that the law was an attempt to regulate the conduct of the telegraph company throughout the entire distance and, therefore, interfere with interstate commerce with respect to telegraph companies, of which Congress had taken exclusive control.

On the contrary, with regard to the present case, the enforcement of the state law as to liability of a carrier for negligent injury within the borders of the state to a person riding on an interstate free pass, and as to the validity of a contract of release from such negligence entered into in connection therewith, cannot affect, *even remote-*

ly, the only two questions dealt with in the section of the Hepburn Act relied upon by defendant, namely:

1. What constitutes a free pass?

2. To whom may a free pass be issued?

The cases cited by applicant under the heading of "Assumption of Risk," come under the Federal Employer's *Liability Act*, and the title to the act itself demonstrates that *Congress has legislated on the subject of liability*. Not only this, but it has legislated as to where actions may be brought, and *what may and may not be set up as a defense*. This is a very clear illustration of where Congress has taken over and created the *entire field of liability*. The question of assumption of risk as a defense is the subject dealt with in the case of *Pryor v. Williams*, 41 Sup. Ct. Reporter, No. 4, p. 36, and as Congress has dealt specifically with the question of *assumption of risk* under this title, the case properly holds that by the term, assumption of risk, Congress meant to deal with the federal idea of what constitutes such a risk, and not with a doctrine which is peculiar to Missouri alone.

As to other cases cited by defendant as authority, we have heretofore pointed out the distinction to be made in such cases as arise and are tried *nisi* in the Federal Court, where the Federal Court applies its own interpretation of the common law with respect to the question of liability of the carrier for the negligent injury of persons, irrespective of any provision of the Hepburn Act. As the present case arose and was tried *nisi* in a state court, as heretofore, on a review of the decision of the State Court

by the Federal Court on writ of certiorari, the Federal Court will apply the local or state law as to liability.

The judgment of the trial court in plaintiff's favor is supported by sufficient ground, on the issues made, entirely outside of and independent of any federal question claimed to have been raised in the case, and defendant never appealed on this issue.

Defendant pleads *in haec verbae* a contract on the back of the pass as a defense to its liability to plaintiff for *defendant's negligence* resulting in plaintiff's injury. This contract so pleaded (Trans. 5, folio 9), on its face shows that it *does not contain* any provision releasing defendant from liability to plaintiff *for its negligence*, but only from liability for *accident* and damage to her person and baggage. Plaintiff *denies* that the stipulation or contract relieved defendant from liability to her for injuries *caused by defendant's negligence* (Trans. pp. 67, folios 10 and 12). Independent of the general denial in defendant's answer, plaintiff was entitled to judgment on the pleadings.

Accident, as used in this stipulation, is defined by this court in *Chicago, etc., Railroad Company* v. *Pullman Company*, 139 U. S., l. c. 86, as follows:

> "Accident or casualty, according to a common understanding, proceeds from an unknown cause, or is an unusual effect from a known cause."
>
> "Accident is generally defined as an unusual and unexpected event happening without negligence."
>
> Corpus Juris, Vol. 1, Sec. 5, pp. 302-303.

Thus the stipulation as to non-liability for *accident* and damage to plaintiff's person does not relieve defendant as to liability for damage to plaintiff's person *caused by the negligence of defendant*, as the parties did not contract with respect to defendant's liability for negligence.

In this respect the stipulation differs from those in the following cases cited by defendant:

Charleston & West. Car. Ry. Co. v. *Thompson*, 234 U. S. 577.

Northern Pac. Ry. Co. v. *Adams*, 192 U. S. l. c. 442.

Boehring v. *Chesapeake Beach Ry. Co.*, 193 U. S. l. c. 448.

In each and all of which cases the contract of release on the back of the pass contained, in substance, the specific provision that the party accepting the free pass agreed that the defendant carrier should not be liable for damage or injury to person *caused by the negligence* of the agents of such carrier.

Where, as here, the judgment of the trial court can be sustained on a ground independent of a federal question, this court will refuse to review it on certiorari or otherwise.

Southern Pac. Ry. v. *Schuyler*, 227 U. S. l. c. 612.

Counsel for respondent respectfully urges that the judgment of the Missouri Supreme Court should be affirmed.

CHARLES H. MONTGOMERY,
Attorney for Respondent.

Joplin, Mo., Nov. 4th, 1922.